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OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing
Date of Filing: July 27, 2007
Case Number: TSO-0523

This Decision concerns the continued eligibility of XXXXXX XXXXX XXX (hereinafter referred to as "the individual") to hold an access authorization (or "security clearance") under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should be restored.

I. Background

The individual is employed by a Department of Energy (DOE) contractor and held a security clearance as a condition of his employment. In September 2006, an employee at the site where the individual works reported that the individual smelled of alcohol while on duty. After a fitness for duty evaluation, he was placed on temporary work restrictions later that month, with an order to abstain from alcohol. However, in November 2006, the individual tested positive on a random alcohol test and, as a result, was removed from work for five weeks. In order to resolve the security concern arising from the individual's alcohol use, the local DOE security office (LSO) conducted a Personnel Security Interview (PSI) with the individual in December 2006. The PSI did not resolve the concern and in February 2007, a DOE consultant-psychiatrist evaluated the individual. The psychiatrist found that the individual was suffering from alcohol abuse, an illness which causes or may cause a significant defect in the individual's judgment or reliability. The psychiatrist further found that the individual did not show adequate evidence of rehabilitation or reformation as of the date of the evaluation.

In June 2007, the LSO informed the individual how to proceed to resolve the derogatory information that had created a doubt regarding his continued eligibility for access authorization. Notification Letter (June 27, 2007). The Notification Letter stated that the derogatory information regarding the individual falls within the purview of 10 C.F.R. § 710.8 (h), (j), and (l) (Criteria H, J and L). The LSO invoked Criterion H based on information in its possession that the individual has an illness or mental condition that causes or may cause a significant defect in his judgment or reliability. The LSO invoked Criterion J on the basis of information that the individual has been or is a user of alcohol habitually to excess, or has been diagnosed by a board-certified psychiatrist, or other licensed physician or a

licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse. 10 C.F.R. § 710.8 (j). In this regard, the Notification Letter cites the diagnosis of the DOE consultant-psychiatrist that the individual suffered from alcohol abuse. Alcohol abuse, in the opinion of the DOE consultant-psychiatrist, is an illness or mental condition that causes or may cause a significant defect in the individual's judgment or reliability. 10 C.F.R. § 710.8 (h). The LSO also invoked Criterion L, alleging that the individual "has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of the national security." 10 C.F.R. § 710.8 (l). This charge is based on alleged inconsistencies in the individual's statements to the DOE psychiatrist and the individual's alcohol consumption despite an order to abstain.

In a letter to DOE Personnel Security, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the DOE consultant-psychiatrist (the psychiatrist) testified on behalf of the agency. The individual testified on his own behalf and also elected to call his wife, a colleague, his supervisor, his family physician and his alcohol counselor as witnesses. The transcript taken at the hearing shall be hereinafter cited as "Tr." Various documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex." Documents submitted by the individual shall be cited as "Ind. Ex."

II. Analysis

The applicable regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual's future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the following applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or

reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, it is my opinion that the individual's access authorization should be restored at this time because I conclude that such a restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. Findings of Fact

The individual has been employed by a DOE contractor for 15 years, and held a clearance at the request of his employer. Ex. 6; Ex.16. In 2000, the results of a physical examination showed that the individual had elevated liver enzymes, an abnormality that sometimes reflects excessive alcohol consumption. Tr. at 100. The individual took the results to his family doctor, who advised the individual to stop drinking for six weeks in order to see if his levels improved. *Id.* at 104. At the end of six weeks, the enzyme levels had returned to normal and the doctor told the individual that he could resume drinking in moderation. *Id.* at 102-105. In November 2005, the site occupational medicine office called the individual's supervisor and explained that the office had "heard" that there may be an issue with the employee, but the office could not describe a specific problem. *Id.* at 25. The supervisor checked the individual's attendance records and became more observant of the individual, but found nothing amiss. *Id.* at 26.

Early one afternoon in September 2006, the individual left his office to retrieve a key from an employee in another office. PSI at 9-14. He then attended a one o'clock meeting with his supervisor and other team leaders. During the meeting, the site occupational medicine department called the supervisor to inform him that a coworker had complained that the individual smelled of alcohol. *Id.* at 27. The supervisor did not believe the allegations and asked the company psychologist how to clear the individual's name. The company psychologist suggested that the supervisor request a fitness for duty evaluation. Tr. at 29. At the end of the day, the manager informed the individual of the allegations. PSI at 13. The following day the individual met with the company psychologist for 30 minutes. *Id.* at 14-18. The psychologist explained that he was issuing temporary work restrictions for the individual. *Id.* at 18. He also reviewed the individual's medical file and noted that one of his liver enzymes was elevated. *Id.* at 24. On September 14, 2006, the contractor psychologist issued a memorandum that described the temporary restrictions on the individual. Ex. 12. On September 27, 2006, the psychologist removed some restrictions and added others, including an order to abstain from alcohol. Ex. 11. The individual visited his primary care physician for testing, and the primary care physician concluded that all results were within normal limits. Tr. at 107; PSI at 28. The individual was angry when the work restrictions were imposed, and considered them excessive. *Id.* at 181. He began a series of six sessions with the site Employee Assistance Program counselor. PSI at 34-37.

On the evening of November 6, 2006, the individual consumed two mixed alcoholic drinks while watching an awards show on television. PSI at 38. On the following day, the individual was selected for a random breathalyzer test, and registered .01. Ex. 3 at 3. He was ordered to meet with the company psychologist again, and the psychologist gave him

contact information for two local alcohol treatment programs and sent him home for five weeks. Ex. 10; PSI at 39-40. The individual decided to attend an intensive outpatient alcohol treatment program run by an alcohol counselor who is also a social worker. He enrolled in the program and was given a urine screen on November 13, 2006, as part of the intake process. The test results showed an elevated EtG level which is, according to the laboratory that analyzed the specimen, a sign of alcohol in the body. Tr. at 130-131. In December 2006, the contractor imposed new temporary restrictions on the individual. Ex. 10.

The LSO conducted a PSI with the individual in December 2006. Ex. 19 (PSI). The individual agreed to an evaluation by a DOE consulting psychiatrist. Because the PSI did not resolve the derogatory information, the LSO scheduled a psychiatric evaluation for the individual in February 2007. The consultant-psychologist interviewed the individual on February 8, 2007, and completed a report of her interview. Ex. 8 (Report). The psychiatrist found that the individual met the criteria for alcohol abuse from November 2005 to November 2006, and that he did not present adequate evidence of rehabilitation or reformation. Report at 16-17. She concluded that the alcohol abuse was an illness or mental condition under Criterion J that could cause a significant defect in the individual's judgment or reliability. *Id.* at 17. The psychologist recommended that in order to show adequate evidence of rehabilitation, the individual should complete the alcohol outpatient program that he was attending and also complete at least 18 months of aftercare. For adequate evidence of reformation, she recommended that the individual either remain sober for one year after the end of the treatment program or show two years of sobriety if he does not complete the program. *Id.*

B. DOE's Security Concerns

The excessive use of alcohol raises a security concern because of its intoxicating effect. "Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness." See *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, Memorandum from Assistant to the President for National Security Affairs* (December 29, 2005) (Revised Adjudicative Guidelines) at ¶ 21. In this case, the individual was diagnosed by a DOE psychiatrist as suffering from alcohol abuse. Therefore, DOE's security concerns are valid and the agency has properly invoked Criteria H and J in this case.

As for Criterion L, the LSO alleges that the individual gave inconsistent answers in response to questions about his alcohol use, and that he consumed alcohol despite being ordered to abstain by work restrictions. This conduct calls into question the individual's judgment, reliability, trustworthiness and ability to protect classified information. See *Revised Adjudicative Guidelines* at ¶ 15-16. Thus, the security concern under Criterion L is also valid and the invocation of Criterion J is proper in this case.

C. Hearing Testimony

1. Character Witnesses

The individual offered the testimony of a colleague, his wife, and his manager as character witnesses. The colleague testified about his 20-year professional association with the individual, whom he described as reliable and dependable. Tr. at 9-20. They occasionally socialize outside of work, but he has never seen the individual drink while on duty. Further, he has not seen the individual consume alcohol within the past 12 months, and he has not heard any other employees complain about his drinking. The individual's wife of 15 years testified that her husband was confused and upset that he had been falsely accused in 2005 and also in 2006. *Id.* at 67-68. They do not keep alcohol in the house and he has not consumed alcohol since the night in November 2006 when he had two drinks while watching television. *Id.* at 79-80. His wife supports his abstinence. *Id.* at 86-87.

The manager has supervised the individual for 12 years, and considered him to be reliable, honest and forthright. Tr. at 23. The supervisor testified that in 2005, he received a call from occupational medicine about a possible problem with the individual but they were unable to provide any details about the alleged problem. *Id.* at 24. Nonetheless, the manager reviewed records of the individual's attendance and made himself more "aware" of the employee's behavior, but could do no more in the absence of a concrete problem. *Id.* at 26. In September 2006, the company psychologist called the manager to inform him that at midday another employee had complained that the individual smelled of alcohol. The supervisor was quite surprised and did not believe the allegation because he had attended a meeting with the individual that afternoon and had not smelled alcohol on the individual. *Id.* at 28. The manager also told the psychologist that he had been observing the individual closely since the previous call in November 2005 about undisclosed "issues" with the individual and had not observed any problems in his behavior. *Id.* at 31. The supervisor does not think that it is possible to blackmail the individual because his entire work group knows that his badge was taken away. *Id.* at 60.

2. The Individual

The individual testified that in 2000, after a company physical indicated that his liver enzymes were elevated, he went to his primary care doctor and abstained from alcohol for six weeks as ordered by the doctor. Tr. at 164-166. After his enzyme levels returned to a normal range he moderated his drinking, but insisted that no one had connected his alcohol consumption and elevated enzymes, or expressed alarm at his drinking. *Id.* at 168. After his manager got a call in 2005 about a nonspecific problem, he tried to be aware of what may have prompted such a remark. *Id.* at 175. In September 2006, he was surprised that someone smelled alcohol on his breath because he participated in a meeting only 20 minutes after he picked up the key. *Id.* at 176. Even though he was angry at what he considered excessive work restrictions, he nonetheless abstained from alcohol without any difficulty for six weeks, until he "made a stupid decision" one night in November 2006 and had two drinks. *Id.* at 182-183. He was surprised when the results of the alcohol treatment program intake test revealed alcohol in his system seven days later. *Id.* at 185. According to the individual, that November evening was the only time that he had consumed alcohol

since he was put under work restrictions. *Id.* at 186. He first acknowledged that he had a problem when he was sent home by the psychologist in November 2006.

The individual maintained that he was honest with the DOE psychiatrist. However, because he did not want to speculate on facts and was confused when he was unable to accurately quantify his alcohol consumption, he believes that the psychiatrist misinterpreted some of his answers. *Id.* at 195. For example, he testified that the psychiatrist misinterpreted a follow-up report from the alcohol counselor, and that the psychiatrist mistakenly believed that the family doctor performed additional tests when he did not. *Id.* at 197. Further, the psychiatrist assumed that he used one ounce of alcohol per cocktail (i.e. the amount in a jigger), but he actually used much more. *Id.* at 199. He does not intend to drink in the future, and is no longer angry at the psychologist or his employer. He has learned not to self-medicate and his wife supports his desire to abstain. *Id.* at 201.

3. The Family Doctor

At the hearing, the individual's family doctor discussed the abnormalities that he found in the individual's liver enzymes in October 2000. The individual came to his family doctor because his lab physical discovered elevated cholesterol and abnormal liver enzymes. Tr. at 102. As a result, he told the individual to abstain from alcohol for six weeks. *Id.* at 102-104. The results of test in February 2001 showed that his levels were normal. *Id.* at 105. He also strongly warned him about alcohol. The individual's test results were normal in October 2006 and in September 2007. *Id.* at 106-107. He concluded that the individual's liver enzyme problem has been resolved. *Id.* at 117.

4. The Individual's Alcohol Counselor

The individual's alcohol counselor has a master's degree in social work and is a licensed alcohol and drug abuse counselor who directs a local intensive outpatient program. *Id.* at 125. The individual enrolled in the program in November 2006. *Id.* at 126. The program met three times per week – two group session followed by individual meetings, and then less frequent meetings. After three to four months, the client's transition to aftercare, which is a weekly 90 minute meeting. The individual has been in aftercare since January 2007 (one year prior to the hearing). *Id.* at 127. See also Indiv. Ex. 8. He has 100% attendance and has impressed the counselor with his reliability. *Id.* at 140. The individual took 21 urine screens, the first on November 13, 2006. All results were negative except the first test. *Id.* at 128.

According to the alcohol counselor, the individual had a high level of EtG in his November 13, 2006 test even though the individual claimed that he last consumed alcohol on November 6, 2006. The counselor was skeptical of this claim because, according to the laboratory, EtG can be detected in urine for approximately 80 hours after ethanol has been completely metabolized out of the body. *Id.* at 130-131.¹ The individual was tested six

¹ According to the alcohol counselor, EtG is a fairly new and more stringent screen that tests for the metabolite (an organic compound produced by metabolism) of beverage alcohol. Tr. at 129. The test that the counselor used before only disclosed the presence of ethanol. *Id.*

days (144 hours) after his alleged last drink and still had positive results. *Id.* at 131. However, other than the test, the counselor had no reason to think that the individual may have had a drink more recently than November 6, 2006 (over one year prior to the hearing). *Id.* at 132. The counselor gave very positive descriptions of the individual's experience in the treatment program. He stated that the more education the individual received, the more he seemed to gain from his sessions. *Id.* at 141. The individual was cooperative, had 20 negative drug tests and never seemed to be struggling with abstinence. *Id.* at 140. The counselor considers the individual to be rehabilitated and reformed from alcohol abuse. *Id.*

5. The DOE Psychiatrist

The DOE psychiatrist was present during the entire proceeding and testified at the end after listening to all of the testimony. She explained that she had recommended that the individual follow the treatment plan of the alcohol counselor, which she read in preparation for her evaluation in February 2007. *Id.* at 209. At the hearing, she was impressed by the counselor's up-to-date alcohol testing method. *Id.* Since there is no evidence that the individual has consumed alcohol since November 2006, she concluded that he has shown adequate evidence of reformation. *Id.* As for rehabilitation, the psychiatrist deferred to the judgment of the counselor that the individual completed the recommended period of aftercare. *Id.* at 210.² She testified that the individual has also presented adequate evidence of rehabilitation because he is currently in treatment and is following the program prescribed by his alcohol counselor. *Id.* at 215.

D. Mitigation of Security Concerns

1. Criterion H – Illness or Mental Condition

As stated above, the DOE psychiatrist testified that the individual has shown adequate evidence of reformation and rehabilitation from the diagnosis of alcohol abuse that he received in February 2007. In her Report, she stated that alcohol abuse was the illness or mental condition that gave rise to the Criterion H concern that the individual may have a significant defect in his judgment or reliability. Because he no longer suffers from alcohol abuse, I find that the individual no longer has an illness or mental condition that could cause such a defect in his judgment or reliability and conclude that he has mitigated the security concern regarding Criterion H.

2. Criterion J – Alcohol Abuse and Excessive Use of Alcohol

In a Part 710 proceeding, the Hearing Officer gives great deference to the expert opinions of mental health professionals regarding rehabilitation or reformation. *See Personnel*

² In a January 2007 report about the individual's treatment program, the counselor recommended that the individual attend 18 months of aftercare. Ind. Ex. 1. The psychiatrist read this document in preparation for her interview and also recommended 18 months of aftercare. However, at the hearing the counselor testified that he made a mistake and that the correct recommendation is 12 months of aftercare. Tr. at 137-138.

Security Hearing, OHA Case No. TSO-0491, 29 DOE ¶ 83,077 (2007) (finding of rehabilitation and reformation from habitual use of alcohol under Criterion J); *Personnel Security Hearing*, OHA Case No. TSO-0494, 29 DOE ¶ 83,071 (2007) (finding of no rehabilitation or reformation from habitual use of alcohol under Criterion J). In this case, the DOE psychiatrist testified that, at the time of the hearing, the individual no longer met the criteria for a diagnosis of alcohol abuse and that he has shown adequate evidence of rehabilitation and reformation from the diagnosis. The individual's alcohol counselor also testified that the individual has shown adequate evidence of rehabilitation and reformation from alcohol abuse. I find the arguments of the psychiatrist and the alcohol counselor to be persuasive. The record also contains documentary evidence and witness testimony that supports the conclusions of the experts. Therefore, after reviewing the record in this case, I find that the individual has mitigated the Criterion J security concerns. 10 C.F.R. § 710.8 (j).

3. Criterion L – Unusual Conduct

Based on a careful review of the record, I find that the individual has successfully mitigated the Criterion L security concerns set forth in the Notification Letter. He has credibly explained his responses to the DOE psychiatrist during her evaluation and set forth a reasonable explanation that there was a misunderstanding on both sides during the interview. Further, the individual's consumption of alcohol in violation of the conditions of the work restriction raised valid questions regarding his honesty, reliability and trustworthiness. However, there is substantial evidence in the record to confirm that the individual is now in the aftercare stage of a reputable treatment program that has rehabilitated him from the condition that caused the unusual conduct. Therefore, I find that this unusual conduct is unlikely to recur, and that the security concern is mitigated by the counseling that has successfully changed his behavior. See Revised Adjudicative Guidelines, ¶ 17 (d).

IV. Conclusion

The individual has successfully mitigated the security concerns of Criteria H, J and L. Thus, in view of these criteria and the record before me, I find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: April 2, 2008

